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No. 86-1642

In the Supreme Court of the United States

OCTOBER TERM, 1987

MONONGAHELA POWER COMPANY, ET AL.,
PETITIONERS

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

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2408

QUESTION PRESENTED

Whether hydroelectric projects licensed under the Federal Power Act, 16 U.S.C. 791a *et seq.*, are exempt from the requirements of Sections 301(a) and 404 of the Clean Water Act, 33 U.S.C. 1311(a) and 1344, which prohibit all discharges of dredged or fill material into the navigable waters of the United States except pursuant to permit issued by the Secretary of the Army.

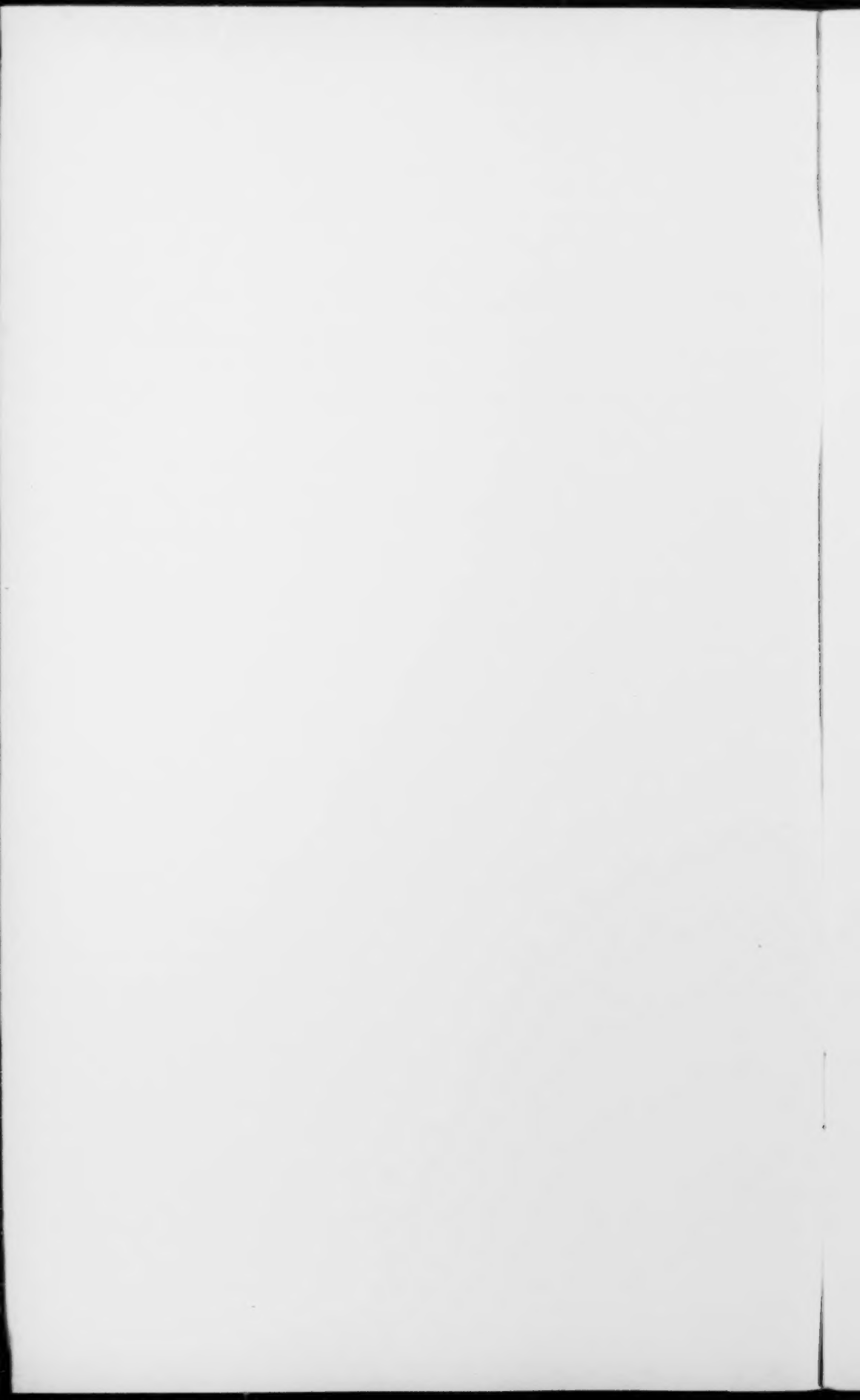


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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 809 F.2d 41. The opinion and order of the district court (Pet. App. B1-B15) are reported at 507 F. Supp. 385.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1987. The court of appeals denied

rehearing en banc on March 24, 1987 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on April 13, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

This case concerns the application of two federal statutes, the Federal Power Act, 16 U.S.C. 791a *et seq.*, and the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.*, to the proposed construction of a pumped storage hydroelectric facility project. The Federal Power Commission (FPC), the predecessor of the present Federal Energy Regulatory Commission (FERC),¹ granted petitioners (a consortium of electric power companies) a license under the Federal Power Act (Pet. App. A4). The Corps of Engineers (Corps) denied petitioners a Section 404 permit under the Clean Water Act, 33 U.S.C. 1344, on the ground that the project would cause extensive environmental harm (Pet. App. A4). The district court held (*id.* at B1-B15) that the Section 404 permit program did not apply to the project, which the court concluded was subject to FERC's exclusive jurisdiction under the Federal Power Act. The court of appeals reversed (Pet. App. A1-A26) and upheld the Corps' Section 404 jurisdiction.

1. In 1970, petitioners applied to the Commission for a license to construct a 1,000-megawatt pumped storage hydroelectric project on the Blackwater River in the Canaan Valley of West Virginia. The project would require construction of two reservoirs—a large

¹ See 42 U.S.C. 7172(a) (1) (A). Like petitioners (see Pet. 4 n.1), we refer to the FPC and FERC interchangeably as the "Commission" in this submission.

reservoir downstream and a smaller reservoir upstream. Water stored in the two reservoirs would inundate more than 7,000 acres of freshwater wetlands. Pet. App. A3.

a. In 1976, the administrative law judge (ALJ) in the Commission licensing proceeding denied petitioners' application for a license (Pet. App. A3). The ALJ found that the project would devastate the wetlands as a unique and diverse botanical and wildlife habitat (*id.* at A3-A4). In particular, the project would destroy one third of the wetlands, eighty percent of the bog, muskeg, and swamp forest communities, and one half of the wildlife habitat in the Canaan Valley. In addition, the project would inundate fifty acres of beaver ponds and forty miles of streams and rivers, which would decrease by sixty percent the self-sustaining brown trout fisheries in West Virginia. C.A. App. 214.

The ALJ further found (Pet. App. A4 n.8 (quoting C.A. App. 216)) that "none of the proposed mitigation plans appears reasonably appropriate or feasible to effectively outweigh the negative aspects inherent in the adoption of the proposed project, requiring a flooding of a considerable part of the floor of the Canaan Valley and radically changing its whole interdependent environment." Finally, the ALJ indicated (*ibid.*) approval of a modified project, involving a much smaller lower reservoir, which would have a much smaller adverse environmental impact (inundating only 700 acres).

b. In 1977, the Commission reversed the ALJ's decision and issued a license for the project (Pet. App. A4). The Commission described (C.A. App. 236) the proceeding as a "conflict between those favoring recreation and those favoring the environment in its present state." The Commission stated

(C.A. App. 261) that its issuance of a license was "motivated by the need * * * for pumped storage capacity and the construction of a facility which will provide substantial recreational opportunities." The Commission "recognize[d] that some botanical and wildlife resources will be destroyed," but concluded that "this can be mitigated in various ways, particularly by the dedication of additional land [by petitioners]" (*ibid.*). Finally, pursuant to its statutory mandate, the Commission concluded (C.A. App. 261, 262) that the project, as modified, would both be in the "public interest" and "be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate commerce, for the improvement and utilization of water power development, and for other beneficial uses, including recreational purposes, within the meaning of Section 10(a) of the Federal Power Act."²

2. Petitioners subsequently applied to the Corps of Engineers for a permit under Section 404 of the Clean Water Act, 33 U.S.C. 1344, to place dredged or fill material into navigable waters of the United States in connection with project construction (Pet. App. A4). Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), prohibits any discharge of pollutants, including dredged and fill material, into

² The Commission's decision is currently the subject of three petitions for review, including one by the Secretary of the Interior, pending in the Court of Appeals for the District of Columbia Circuit. *Sierra Club v. FERC*, Nos. 77-1736, 77-1737, and 77-1845. The court of appeals has heard oral argument in those consolidated appeals, but has stayed further proceedings pending resolution of this case see Pet. App. A4 n.10).

navigable waters, except pursuant to a Section 404 permit issued by the Secretary of the Army. Petitioners did not then object to the Corps' jurisdiction (Pet. App. A5).

After holding public hearings on petitioners' permit application and receiving written comments, the Corps of Engineers denied the permit (Pet. App. A4). The Corps concluded (C.A. App. 684; see Pet. App. A4) that the project as proposed "would alter and irreparably damage a significant natural resource, the Canaan Valley wetland complex." The Corps also concluded (C.A. App. 684) that "[t]here are available alternate sites which would fulfill the same electrical energy needs and which are far less damaging to the natural environment." The Corps suggested (*ibid.*) that petitioners pursue one of those alternatives.³

3. Petitioners filed this action in federal district court against the Secretary of the Army and certain Corps of Engineers officials. They sought declaratory and injunctive relief that hydroelectric projects licensed by the Commission are exempt from Section 404 of the Clean Water Act and accordingly that the Corps has no jurisdiction to require a permit for any

³ The Environmental Protection Agency (C.A. App. 606-608), the Department of the Interior (C.A. App. 441-446), and the West Virginia Department of Natural Resources (C.A. App. 686) each opposed issuance of the permit citing the destructive impact of the project on the unique combination of wetland resources in the Canaan Valley. The Corps reviewed the environmental impact statement submitted as part of the hydroelectric licensing proceeding (C.A. App. 336-440) and commissioned and received a report by a wetlands biologist evaluating the effects of the proposed project on the wetland and other resources of the valley (C.A. App. 609-649).

dredge or fill activity related to construction of the project. Pet. App. A5. The district court agreed and granted petitioners' motion for summary judgment (*id.* at B1-B15).

4. The court of appeals reversed (Pet. App. A1-A26). The court concluded (*id.* at A11) that Commission-licensed hydroelectric projects are neither expressly nor impliedly exempt from the terms of Sections 301(a) and 404 of the Clean Water Act. The court noted (Pet. App. A11) first that the terms of the Act "would seem to require a Corps permit for such discharges unless some exemption is available" and that the list of activities expressly exempted from the permit requirement by Section 404(f), 33 U.S.C. 1344(f), does not include Commission-licensed projects. The court next ruled (Pet. App. A19-A26) that such projects are not impliedly exempt from the Clean Water Act's requirements. The court reasoned (*id.* at A21) that "fidelity to the legislative scheme" of the Clean Water Act precludes any implied exemption for Commission-licensed projects because under the Federal Power Act the Commission does not, and need not, subject its license applicants to a "review under substantive standards comparable to those established pursuant to Section 404(b)(1) [of the Clean Water Act]." The court stressed (Pet. App. A23-A24 (footnote omitted)) that the Commission's guidelines, unlike the Section 404(b)(1) standards employed by the Corps, "assigned no relative weights to competing objectives."

ARGUMENT

The petition for a writ of certiorari should be denied. The petition presents no important issue of legal or practical significance, and the decision of the court of appeals does not conflict with any decision of this Court and is in accord with the only other court of appeals decision addressing the issue. For these reasons, the Commission acquiesces in the result of the court of appeals' decision and believes the petition should be denied. The Corps of Engineers believes that further review is not warranted for the additional reason that the decision of the court of appeals is correct.⁴

1. Petitioners' argument (Pet. 21-25) that the issue presented by the petition is important misapprehends the decision of the court of appeals. Contrary to petitioners' contention (Pet. 10), the court of appeals did not "strip[] the Commission of its established and substantive environmental role." The court of appeals merely concluded that the Commission does not possess *exclusive* jurisdiction over the environmental consequences of hydroelectric projects. The exclusivity ruling, moreover, does not involve an issue of broad legal or practical importance.

a. First, petitioners are mistaken in claiming that the court of appeals ruled that the Commission has no substantive authority or obligation to consider environmental factors in determining whether issuance

⁴ The Environmental Protection Agency (EPA) also has programmatic authority in the implementation of Section 404 (see 33 U.S.C. (& Supp. III) 1344(b), (c), (g), (h), and (i); Pet. App. A10-A11), as well as an overall responsibility for administering the Clean Water Act. The EPA is not a party to this case, but shares the Corps' view of the correctness of the decision below.

of a license would be in the "public interest," as required by the Federal Power Act. Certainly, neither the Corps of Engineers nor, more importantly, the Commission reads the court of appeals' decision as adopting that view. The decision instead simply rests on the court's conclusion that the respective substantive environmental roles of the Commission (under the Federal Power Act) and of the Corps of Engineers (under the Clean Water Act) are sufficiently distinct that the Commission's substantive jurisdiction should not be read as precluding that of the Corps of Engineers.

The court of appeals' decision does not therefore disturb the well-settled proposition that the Commission has the authority, indeed the duty, both to consider environmental factors in deciding whether to issue a license under the Federal Power Act's "public interest" standard (16 U.S.C. 803(a); see *Udall v. FPC*, 387 U.S. 428, 432-444 (1967)) and to deny a license whenever those factors tip the balance against its issuance. Petitioners' contrary suggestion rings especially hollow given that neither the agency (the Commission) whose substantive environmental mandate petitioners are purporting to protect nor the environmental organizations whose conservation interests petitioners are claiming to safeguard share petitioners' tortured reading of the court of appeals' decision.⁵ Petitioners' characterization of the impor-

⁵ The Sierra Club, West Virginia Highlands Conservancy, National Wildlife Federation, Environmental Defense Fund, and National Audubon Society were parties below and have filed with this Court a joint opposition to the petition in which they similarly refute petitioners' reading of the court of appeals' decision. See Br. in Opp. 21-24.

tance of this case therefore challenges a ruling that is simply not presented by the decision below.

b. The court of appeals' ruling on exclusivity does not, moreover, present an important issue that warrants this Court's review. As a practical matter, agencies, such as the Commission and the Corps of Engineers in this case, work out their overlapping programmatic interests through memoranda of understanding that allow each agency a substantial role in the decisionmaking process. Indeed, the Commission and the Corps have entered into just such an understanding regarding their respective jurisdictions over non-federal hydropower development, which is why the Commission believes that the exclusivity issue (while wrongly decided in its view) is of little practical moment. For both agencies, this case is the infrequent instance when the fact that the two agencies had independent permitting authority to implement their distinct substantive environmental roles made a difference in the outcome to a permit applicant. It is no mere happenstance that the issue raised by the petition—whether a Corps Section 404 permit is required of Commission-licensed hydroelectric facilities—has arisen in only one other reported case during the past fifteen years in which the Federal Power Act and the Clean Water Act have co-existed.⁶ Hence, although the exclusivity issue is no

⁶ Petitioners mistakenly state (Pet. 7) that the Corps did not assert Section 404 jurisdiction generally over hydroelectric projects until 1977. From the time the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, were enacted, the Corps has consistently interpreted that provision as applying to hydroelectric projects. Shortly after passage of the Amendments, the Corps proposed regulations to implement its Section 404 authority.

doubt of some financial interest to petitioners in this particular case, it is not an important legal issue that warrants this Court's review—at least in the absence of a conflict in the circuits.

2. By omission, petitioners concede that the decision of the court of appeals does not conflict with any decision of any other court of appeals. Indeed, petitioners are unable to cite even to a district court decision in another case that reached a different result. In fact, there appears to be only one other case that has raised the issue presented here, *Scenic Hudson Preservation Conference v. Callaway*, 370 F. Supp. 162 (S.D.N.Y. 1973), aff'd per curiam, 499 F.2d 127 (2d Cir. 1974), and the decision of the court of appeals here agrees with the rulings of both the district court and the court of appeals in that case.

In *Scenic Hudson*, the district court, like the court of appeals here, rejected (370 F. Supp. at 170) the arguments that application of Section 404 to Com-

38 Fed.Reg. 12217 (1973). The regulations, as proposed and adopted, expressly required a Section 404 permit for any hydroelectric project that involved the discharge of dredged or fill material into navigable waters. 39 Fed. Reg. 12119 (codified at 33 C.F.R. 209.120(c) (6) (1974)). The Corps has consistently maintained this interpretation. See 33 C.F.R. 320.3(f). *Scenic Hudson Preservation Conference v. Callaway*, 370 F. Supp. 162, 164 (S.D.N.Y. 1973), relied upon by petitioners for their contrary assertion, states that the Corps initially took the position that Section 404 did not apply to the "Storm King project," the particular project involved in that case, but that the Corps subsequently changed position. This recital of the procedural history of the case, without further elucidation, is entitled to no weight given the Corps' otherwise consistent interpretation that Section 404 does apply to hydroelectric projects.

mission-licensed hydroelectric projects is inconsistent with the Commission's regulatory authority under the Federal Power Act and that the Commission performs the functional equivalent of a review by the Corps of Engineers (and the Administrator of the Environmental Protection Agency, see 33 U.S.C. 1344(c)) under Section 404. Like the court of appeals here, the district court also concluded (370 F. Supp. 170) that Congress did not intend to make an exception from the sweeping prohibitions and permit requirements of the Clean Water Act for Commission-licensed projects. The district court was similarly of the view (*ibid.*) that the substantive environmental mandates conferred on the Corps by Section 404 and on the Commission by the Federal Power Act are sufficiently distinct that the latter should not be read as precluding application of the former. The Second Circuit in *Scenic Hudson* affirmed (499 F.2d at 127) in a per curiam opinion based on the district court's "well-considered opinion."

3. Finally, the Corps of Engineers believes that further review is not warranted for the additional reason that the decision of the court of appeals is correct. While the Commission acquiesces in the decision below, it continues to believe the decision is incorrect and therefore opposes review only for the reasons set forth above.⁷

In the Corps of Engineers' view, petitioners' contention that Sections 301(a) and 404(b) of the

⁷ On the merits, the Commission agrees with much of the legal arguments advanced by petitioners, which are set out in their petition. For this reason, we do not separately repeat the Commission's merits argument here and we instead detail the views of the Corps of Engineers in response to the petition.

Clean Water Act do not apply to Commission-licensed hydroelectric projects fails in three fundamental respects. First, it ignores the language, structure, and legislative history of the Clean Water Act, which make plain that Congress intends for Section 301(a)'s discharge prohibition and Section 404's permit requirement to apply to those projects. Second, it misapplies and misstates congressional purpose in enacting the Federal Power Act in 1970. Finally, it misapprehends the nature of the Corps' responsibilities under Section 404, when it equates the Corps' substantial environmental mandate with that of the Commission under the Federal Power Act.

a. Contrary to petitioners' assertion (Pet. 15), the decision of the court of appeals does not rely on a "naked presumption" that Section 404 applies to Commission-licensed projects. The court of appeals' construction of Sections 301(a) and 404 was well clothed in the plain meaning of the Clean Water Act, as evidenced by its language, structure, and legislative history. As noted by the court of appeals (Pet. App. A11), the relevant statutory language nowhere suggests an exception for Commission-licensed hydroelectric projects. Sections 301(a) and 404 provide in no uncertain terms that "any discharge of dredged or fill materials into navigable waters * * * is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to [Section] 404" (*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985)).

As the court of appeals also pointed out (Pet. App. A19-A20), the structure of the Clean Water Act similarly refutes petitioners' proffered exemption. In Section 404(f), Congress has carefully delineated the particular activities that are exempt from Sec-

tion 404.⁸ Congress's failure to include Commission-licensed hydroelectric projects, or even any comparable activity, in that list is well-nigh dispositive. The legislative history of the Clean Water Act confirms, moreover, what the statutory language and structure make plain.⁹ As the court of appeals recounts (Pet. App. A9-A10), the legislative history shows that Congress "recognized that some other legislative objectives would have to be reconciled with the new pollution-control efforts," and that Congress made no effort to exempt the adverse environmental consequences of hydroelectric projects from its "ef-

⁸ Section 404(f) (1) and (2) expressly exempt from Section 404's permit requirement certain minor discharges which do not bring navigable waters into a use to which they were not previously subject (33 U.S.C. 1344(f) (1) and (2)). In addition, Congress has provided for issuance of general permits in specified circumstances in lieu of individual applications (Section 404(e) (1), 33 U.S.C. 1344(e) (1)), for transfer of portions of the federal program to states (Section 404(g), 33 U.S.C. 1344(g)), and for exemptions of federal projects specifically identified by Congress (Section 404(r), 33 U.S.C. 1344(r)).

⁹ Contrary to petitioners' assertion (Pet. 15), the relevant legislative history does not show that Section 404 is "intended merely to preserve some of the Corps' former jurisdiction." As recently described by this Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 133, Congress intended in the Clean Water Act, including in Section 404, "to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes." See *City of Milwaukee v. Illinois*, 451 U.S. 304, 317-318 (1981) ("The 1972 Amendments to the Federal Water Pollution Control Act * * * were viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation * * *. Congress' intent * * * was clearly to establish an all-encompassing program of water pollution regulation.")

fort to halt the systematic destruction of the nation's wetlands."¹⁰

Finally, even if the meaning of the Clean Water Act were ambiguous in this context (which it is not), the decision below would still be correct because "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress" (*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 131).¹¹ The Corps' con-

¹⁰ Significantly, in 1977, Congress amended Section 404 to include two exemptions to the permitting process (Clean Water Act of 1977, Pub. L. No. 95-217, § 67(b), 91 Stat. 1600), but it took no action to nullify the *Scenic Hudson* decision. Congress exempted, inter alia, "maintenance" of currently serviceable structures such as dikes and dams (33 U.S.C. 1344(f)(1)(C)), but pointedly did not exempt new construction of such structures. It also added the exemption for federal projects specifically authorized by Congress, but only if such projects were subjected to an environmental review which included the Section 404(b)(1) guidelines. 33 U.S.C. 1344(r). The legislative history of the 1977 amendment demonstrates the exceedingly narrow exceptions Congress intended to the scope of Section 404. See Senate Comm. on the Environment and Public Works, 95th Cong., 2d Sess., 3 *A Legislative History of the Clean Water Act of 1977*, at 347-350, 416-417, 420, 470-475 (Comm. Print 1978).

¹¹ For this reason, petitioners err in claiming (Pet. 19-20) that the court of appeals' decision is contrary to *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976). At issue in *Train* was whether the EPA's authority under the Federal Water Pollution Control Act to control the disposal of nuclear waste encompassed materials subject to regulation by the Atomic Energy Commission under the Atomic Energy Act (Pet. App. A15). This Court upheld the federal agency's (EPA's) construction of the Act, which was based upon a "rather explicit statement of [congressional]

struction of the scope of Section 404 is longstanding (see note 6, *supra*) and reasonable “in light of the language, policies, and legislative history of the [Clean Water] Act” (474 U.S. at 131). In contrast, petitioners’ proposed construction of the Act—which would “read into the [Act] a double barreled exemption, enabling them to sidestep the anti-discharge mandate of Section 301(a) and simultaneously escape the permit requirement of Section 404(a)” (Pet. App. A19)—is plainly unreasonable.

b. Petitioners make several attempts to overcome the plain meaning of the Clean Water Act and the deference due the Corps’ reasonable construction of the Act. None is persuasive.

First, petitioners’ reliance on congressional intent in enacting the Federal Power Act in 1920 is both misdirected and erroneous. The dispositive inquiry in this case is what Congress intended when it enacted the Clean Water Act in 1972, not what Congress intended in enacting the Federal Power Act in 1920. In any event, as the court of appeals pointed out (Pet. App. A8), the legislative history of the Federal Power Act suggests that Congress intended that the Commission’s authority would be “comprehensive” only in the sense of “a consolidation of extant responsibilities.” There was “certainly no preemption of subsequently-enacted legislation” (*ibid.*).

intent to exclude AEA-regulated materials from the FWPCA” (426 U.S. at 22). Here, the responsible federal agency (Corps) has concluded that Section 404 does apply and its construction is similarly consistent with all expressions of congressional intent in the Clean Water Act. There is no comparable statement of congressional intent either on the face of the Act or in its legislative history to exclude categorically Commission-licensed hydroelectric projects from the strictures of Section 404.

Petitioners' contrary claim rests on the proposition that the application to Commission-licensees of the requirements of any subsequently-enacted federal law, administered by another federal agency, necessarily constitutes a "repeal" of the Federal Power Act. Under that theory, the Clean Water Act, and presumably any other federal environmental, health, safety, or welfare statutory requirements, would not apply to Commission-licensed hydroelectric projects. Like the court of appeals, we can not suppose that Congress intended such an extreme result in 1920. Nor is there any basis for it either in the Federal Power Act itself or in those subsequent congressional enactments, such as the Clean Water Act, in which Congress has since sought to address pressing national problems.¹²

¹² Neither the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, nor the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, 100 Stat. 1243, upon which petitioners rely (Pet. 12-14), provides any meaningful support for petitioners' claim. The former created the Department of Energy, replaced the FPC with FERC, and made FERC an adjunct of the Department of Energy. Read in context, the reference in the Conference Report (which accompanied that legislation) to FERC's "exclusive jurisdiction" (see H.R. Conf. Rep. 95-539, 95th Cong., 1st Sess. 75 (1977)), addresses only the finality of FERC's jurisdiction within the bureaucratic structure of the new Energy Department and indicates that FERC, rather than the new Secretary of Energy, will have sole (or "exclusive") responsibility for the functions transferred from the FPC. The report does not purport to address the wholly distinct issue, raised in this case, whether Commission-licensed projects are subject to environmental statutory requirements administered by other federal agencies. ECPA is likewise beside the point. ECPA simply increases FERC's obligation

Second, petitioners misapprehend the nature of the Corps of Engineers' statutory responsibilities under Section 404 by assuming (Pet. 17-18, 22, 25) that they are merely duplicative of the Commission's environmental review under the Federal Power Act. The Commission is required to take into account environmental considerations in its licensing proceedings, but, as Congress recently made clear in the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (see note 12, *supra*), the Commission need only give them "equal consideration" with other licensing issues. In contrast, Congress has struck the balance quite differently in the Clean Water Act. The Corps must follow guidelines promulgated under Section 404(b)(1), which impose substantially more stringent substantive limitations upon the Corps' exercise of its permitting authority.¹³

to give "equal consideration" to environmental quality concerns in licensing proceedings (see § 3, 100 Stat. 1243-1245). Nowhere in ECPA or its legislative history did Congress indicate that ECPA's provisions were premised, as petitioners suggest, on the notion that Commission-licensed projects are categorically exempt from all other environmental statutory requirements, such as those imposed by the Clean Water Act. Significantly, moreover, in neither the Department of Energy Organization Act or ECPA did Congress suggest an intent to overrule the Second Circuit's 1974 decision in *Scenic Hudson*, which held that Commission-licensed hydroelectric projects were covered by Section 404 (see page 10, *supra*).

¹³ In addition, under Section 404(c) the Administrator of the EPA may prohibit outright the use of a specific disposal site if he determines that the discharge of dredged or fill material at that site will "have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas * * *, wildlife, or recreational areas" (see 33 U.S.C. 1344 (c)).

The administrative proceedings in this case illustrate the difference. The Section 404(b)(1) guidelines in effect when petitioners' permit application was pending provided that discharges of dredged material would be permitted "only when it can be demonstrated that the site selected is the least environmentally damaging alternative" (40 C.F.R. 230.5(b)(8)(i) (1980)). In the absence of practicable alternative sites, disposal was permitted only if it would not have "an unacceptable adverse impact on the aquatic resources" (*ibid.*). Even more stringent restrictions applied to the discharge of fill material in wetlands (40 C.F.R. 230.5(b)(8)(ii) (1980)).¹⁴

No counterpart to the Section 404(b)(1) guidelines exists (or existed) under the Federal Power Act. Hence, although the Commission recognized that devastation to the wildlife and vegetation would result from petitioners' project (see C.A. App. 244), it concluded that the loss could be offset by various mitigation measures and by fulfilling a desire for flat water recreation in the Canaan Valley (C.A. App. 246-253, 261). Likewise, although the Commission did not dispute that the Glade Run alternative was environmentally less damaging, the Commission rejected that alternative on the ground that it would be without comparable value for fish, wildlife, or recreational uses (see C.A. App. 256). The Commission's licensing determinations accordingly

¹⁴ The current guidelines are at least as stringent. See 40 C.F.R. Pt. 230. See, *e.g.*, 40 C.F.R. 230.10(a) ("[N]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.").

cannot be regarded as the functional equivalent of compliance with Section 404, as the different results in the Commission's and Corps' licensing and permitting proceedings in this case so conclusively demonstrate.

In sum, the court of appeals correctly determined that where, as here, two statutes are eminently capable of coexistence, it is the duty of the courts, absent clearly expressed congressional intent to the contrary, to preserve the effectiveness of each of these statutes. See, *e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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